

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Milwaukee, Wisconsin

WINNEBAGO COLOR PRESS, INC.¹

Employer

and

Case 30-RC-6499

**PAPER, ALLIED-INDUSTRIAL, CHEMICAL
AND ENERGY WORKERS INTERNATIONAL
UNION, AFL-CIO, CLC²**

Petitioner

DECISION AND DIRECTION OF ELECTION³

The issue presented is whether Kevin Gill and Jim Mahan are supervisors within the meaning of Section 2(11) of the Act. The Petitioner's position is that Gill and Mahan lack sufficient authority to demonstrate their supervisory status and therefore should be included in the unit. The Employer contends that Gill and Mahan exercise sufficient independent judgment in directing and assigning of work, assigning overtime, granting time off to employees, disciplining employees, and evaluating employees to constitute supervisors under the Act and therefore should be excluded from the unit. I find the Employer's position persuasive. I conclude that Gill and Mahan are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit.⁴

¹ The name of the Employer appears as amended at hearing.

² The name of the Union appears as amended at hearing.

³ Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended (Act), a hearing was held before a hearing officer of the National Labor Relations Board (Board). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

⁴ The Employer and Petitioner filed post-hearing briefs that were carefully considered. The hearing officer's rulings made at the hearing were free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:⁵

All full-time bindery employees, including leadmen, employed by the Employer at its Menasha, Wisconsin facility, but excluding all regular part-time bindery employees, shipping and receiving employees, lithopress employees, prepress employees, office clerical employees, high school students, guards and supervisors as defined in the Act.

BACKGROUND

The Employer operates a sheet fed commercial printing company in Menasha, Wisconsin. It makes a variety of products including scratch pads, coupons, booklets, brochures and fliers. The facility is owned by Larry Busse. The Employer's operation is divided into various departments including the pressroom, plating, shipping and receiving, and bindery. Only bindery employees are a part of the petitioned-for unit.

The bindery department of the Employer's operation employs approximately fourteen full-time employees, excluding Gill and Mahan, and seven part-time employees. The bindery department operates five days a week, with three shifts. The first shift operates 7:00 a.m. to 3:00 p.m. The second shift (which is also referred to as the night shift) operates 3:00 p.m. to 11:00 p.m. The third shift operates 11:00 p.m. to 7:00 a.m. Of the employees in the bindery department, approximately seven or eight work the first shift, five work the second shift and two work the third shift. Ronald Hopfensperger is the bindery supervisor.⁶ Hopfensperger works from approximately 5:50 a.m. to approximately 3:30 p.m.

The bindery department serves as the last stage in the production process. Employees take printed sheets and put them in various form by cutting them, binding them, and performing

⁵ The parties stipulated that the above unit is appropriate for the purposes of bargaining and I so find. The parties also stipulated to the exclusion of regular part-time bindery employees. Such an exclusion is permitted under Board precedent. See *Bachmann Ubridge Worsted Corporation (Ubridge Mill)*, 109 NLRB 868 fn.9 at 870 (1954).

⁶ Hopfensperger testified at hearing that he hires employees, promotes employees, assigns work, and effectively recommends raises. Accordingly, I find that he is a supervisor as defined in Section 2(11) of the Act.

any necessary work in order to prepare them for shipping. Machines are located in the department to carry out these tasks. Each machine requires a varying degree of skill to set up and operate.

Jim Mahan began working for the Employer approximately twelve years ago as a machine operator in the bindery department. Kevin Gill began working in the bindery department in 1994. In November 2001, Hopfensperger offered Gill and Mahan the position of second shift supervisor. The position had previously been held by employee Rick Nelson. Hopfensperger determined that Nelson's performance was inadequate and selected Gill and Mahan as Nelson's replacement. Hopfensperger selected Gill and Mahan based on their ability and knowledge of the machinery and general bindery work. They were not the most senior bindery employees. Both employees accepted the position. Gill and Mahan alternate shifts. One serves as assistant supervisor to Hopfensperger during the first shift, and the other serves as supervisor during the second shift. The following week the roles are reversed. When Gill and Mahan work the first shift they operate machines and perform ordinary bindery duties, and they are in charge if Hopfensperger is absent from the facility. Gill and Mahan have identical authority. Gill and Mahan are paid an additional forty cents per hour when they work as second shift supervisor. There is no third shift supervisor.

ANALYSIS

A. Legal Principles

Section 2(3) of the Act excludes from the definition of "employee" "any individual employed as a supervisor...." The term "supervisor" is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of proving that an individual is a statutory supervisor rests with the party asserting supervisory status. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). The three-part test for determining supervisory status is whether: (1) the individuals have the authority to engage in any one of the twelve functions listed in Section 2(11) of the Act; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement; and (3) their authority is held in the interest of the employer. *Id.*

The Board has cautioned that the supervisory exemption should not be construed too broadly because the result of such a construction would be to remove individuals from the protection of the Act. *Training School at Vineland*, 332 NLRB No. 152 (2000). The burden of proof, therefore, is a heavy one. See *Franklin Hospital Medical Center d/b/a Franklin Home Health Agency*, 337 NLRB No. 132 (2002), slip op. at 8. The Board reviews the facts in each case in order to differentiate between “the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact.” *Providence Alaska Medical Center*, 320 NLRB 717, 725 (1996). The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*

The indicia enumerated in Section 2(11) are to be read in the disjunctive, hence if an individual possesses a single indicium listed in that Section, that individual is a supervisor. *Unifirst Corp.*, 335 NLRB No. 58, slip op. at 13 (2001) above at 13. In this regard, the evidentiary touchstone is that the individual must possess the authority of any one of the indicia in Section 2(11) and not the exercise of that authority. *Allstate Insurance Co.*, 332 NLRB No. 66, slip op. at 2 (2000).

Finally, in relatively close cases, the Board looks to well-established secondary indicia, including the individuals' job title or designation as a supervisor, attendance at supervisory

meetings, job responsibilities, authority to grant time off, etc., whether the individual possess a status separate and apart from that of rank-and-file employees. See *NLRB v. Chicago Metallic Corp.*, 794 F.2d 531 (9th Cir. 1986); *Monarch Federal Savings & Loan Assn.*, 237 NLRB 844 (1978); and *Flex-Van Service Center*, 228 NLRB 956 (1977).

B. Supervisory Determination

The Petitioner's position is that Gill and Mahan lack sufficient authority to demonstrate their supervisory status and therefore should be included in the unit. The Employer contends that Gill and Mahan exercise sufficient independent judgment in directing and assigning of work, assigning overtime, granting time off to employees, disciplining employees, and evaluating employees to constitute supervisors under the Act and therefore should be excluded from the unit.

For the reasons set forth below, I find that Gill and Mahan are supervisors under the Act.

1. Assignment of Work

The record supports the finding that night supervisors Gill and Mahan assign employees work. Hopfensperger testified that each evening he leaves the night supervisor with a list of tasks to be accomplished. It is then up to the night supervisor to determine which employee to assign which task. In making this determination the night supervisor exercises independent judgment in considering the requirements of the task and the particular skills and ability of each employee. Similarly, situations arise where an employee may finish a project, or a project need may require taking an employee off one machine and putting them on another. In these instances the supervisor must again exercise his independent judgement to determine the appropriate assignment. Mahan confirmed Hopfensperger's testimony regarding assignment of work.⁷

⁷ Gill was not called to testify during the hearing.

2. Evaluations/Rewards

The record supports the finding that by completing evaluations for the second shift employees, Gill and Mahan effectively recommend the raises the employees ultimately receive. The Employer performs annual evaluations of its employees. The evaluations are given at the employee's anniversary date. Gill and Mahan complete the evaluations for all of the second shift employees. After the evaluation is completed, either Gill or Mahan talk to the employee about their evaluation. The employee then signs the evaluation. The evaluation is then shown to Hopfensperger for his signature and then is turned into Busse.

The evaluations are used to determine the employees raises. The Employer gives its employees raises annually. Each year a flat rate for the raises is determined. This flat raise rate is then adjusted based on the employee's performance. This year, for example, the flat raise rate increase was 2 to 2 ½ percent. If an employee, however, had a very good performance rating on their evaluation the flat raise rate could be increased to 4 or 5 percent. Based on the evaluations, Hopfensperger makes a raise recommendation to Busse and Busse ultimately determines the employee's raise.

3. Authorization of Overtime

The record reflects that Gill and Mahan determine when overtime is required and when necessary, authorize employees to work overtime. To determine whether overtime is necessary, Gill and Mahan use independent judgment to evaluate the volume of work that is being done to determine if their production schedules are on target. The record reflects that when Gill and Mahan have determined that overtime is necessary, they have authorized second shift employees to work longer hours as well as calling in third shift employees to start work earlier. Gill and Mahan do not seek Hopfensperger's approval prior to making these determinations.

4. Authority to Allow Employees to Leave Early

The record reflects that Gill and Mahan also grant employees time off from work. Gill and Mahan have exercised this authority by allowing employees to leave early when they were sick, when work was slow, or when the employee had finished their task. Again, this authority was exercised without approval by Hopfensperger.⁸

CONCLUSION

Based on the foregoing, I conclude that Gill and Mahan are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees

⁸ The Employer also asserts that Gill and Mahan are supervisors based on their authority to discipline employees. To support this position Hopfensperger testified that on one occasion Gill came to him complaining about a part-time night shift employee. Hopfensperger told Gill that if the employee refused to follow Gill's orders he could send her home. Mahan also testified about having problems with the same individual. Mahan testified that he also talked to Hopfensperger about the problem. Hopfensperger told Mahan that he would talk to the employee the next day. Based on the isolated nature of these incidents, and the lack of any actual exercise of discipline, I am not basing my finding of supervisory status on their alleged authority to discipline employees.

engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, two copies of an election eligibility list, containing the full names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before November 1, 2002.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by, November 8, 2002.**

Signed at Milwaukee, Wisconsin on this 25th day of October 2002.

Philip E. Bloedorn, Regional Director
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